Supreme Court of the United States

October Term, 1975
No. 75-1316

IRA L. WHITMAN, Director of Environmental Protection, State of Ohio,
Appellee,

vs.

CITY OF CANTON, OHIO,
Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

APPELLANT'S REPLY TO MOTION TO DISMISS

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The Appellee, Director of Environmental Protection of the State of Ohio, in his Motion to Dismiss, contends that no federal questions were properly raised by the City of Canton in the courts below, and that, since the Appellant's briefs in the Court of Appeals and the Supreme Court of Ohio did not specifically assign as error the violation of particular federal constitutional provisions, and since the Court of Appeals and Supreme Court in their respective opinions did not refer to specific federal constitutional provisions, the issue of whether federal questions were in fact raised, considered and determined in this case is foreclosed from further examination. The Appellant, City of Canton, disagrees with this proposition.

Several United States Supreme Court decisions have held that, if it appeared from the record including the opinions of the courts below, that federal questions were in fact considered and determined by the state courts, the establishment of how, when and by whom the federal ques-

tions were raised becomes unnecessary to the decision whether to accept jurisdiction. As stated in the case of *Charleston Federal Savings & Loan Association v. George T. Alderson,* 324 U.S. 182 (1944):

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the Court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of validity of the statute was raised when such question appeared to have been actually considered and decided by that Court."

The case of *Tilt v. Kelsey,* 202 U.S. 43, 51 (1907) further held that where the issue decided in a State court was clearly a federal question, the fact that the State court below did not specifically mention the federal constitutional provisions relied upon, would not prohibit review by the United States Supreme Court. In so ruling, the Court stated in part as follows:

> "Where judicial proceedings in one state are relied upon as a defense to an assessment by the authorities of another state, a right under the Constitution of the United States is specifically set up and claimed though it was not in terms stated to be such a right."

See also *New York v. Zimmerman,* 278 U.S. 63 (1928).

In the case herein on appeal, in spite of the remark in the opinion by the Court of Appeals, that ". . . no federal claim has been made", that court went on to decide that 6111.13 O.R.C. was invalid because the manner in which the law was applied bore no reasonable relationship to the purposes of such law. In view of the language used by the Court of Appeals, the appellant believes it can be fairly concluded that this case was decided in the Court

of Appeals in favor of the City of Canton upon federal substantive due process grounds.

It was from the above ruling of the Court of Appeals, holding that the local election provisions of 6111.13 O.R.C. were unreasonable and rendered the statute invalid, that an appeal was directly taken by the Ohio Director of Environmental Protection to the Ohio Supreme Court for review. In the Ohio Supreme Court, federal questions were brought before the Court for consideration by the Appellee who urged that fluoridation was a valid exercise of the State Police Power and supported this position by reliance upon a series of cases, the preponderance of which dealt with the question of whether various fluoridation laws violated federal due process requirements. It should be noted that in the Motion to Dismiss herein, the Appellee again cites a number of these same cases involving federal questions in support of the proposition that no federal questions were involved.

The Supreme Court of Ohio in its opinion as shown on page A12 of the Jurisdictional Statement specifically considered and overruled the holding of the Court of Appeals, that 6111.13 O.R.C. was void because the local option provisions were not reasonably related to the police power, and stated in part as follows:

> "For the reasons stated above, we disagree with the holding of the Court of Appeals that the inclusion by the General Assembly of local option provisions rendered the entire statute void because they were not reasonably related to the police power."

The Appellant, City of Canton, contends that in so reversing the Court of Appeals, the Supreme Court of Ohio clearly considered and determined a basic federal due process issue, irrespective of whether the Court specifically

cited provisions of the United States Constitution. The Appellant further urges that this was the primary issue decided by the Court of Appeals and reviewed and determined by the Ohio Supreme Court.

Further, in support of the Appellant's position that federal questions were raised, considered, and determined in the state courts below, the Appellant refers this Court to the first of the Syllabi preceding the opinion of the Ohio Supreme Court as shown at page A2 of the Jurisdictional Statement, where the Court states that its decision approves and expands the earlier decision in *Kraus v. City of Cleveland*, 163 Ohio St. 559 (1955). A review of that case reveals that it dealt with substantial federal constitutional questions concerning the validity of the Cleveland Fluoridation Ordinance as an exercise of the police power.

Lastly, the Appellant, City of Canton, contends that the matters presented by the City of Canton in its appeal herein, concerning the validity of 6111.13 O.R.C., and, in particular, the validity of the restrictive local option provisions contained in such statute, involve important federal questions worthy of review by this Court.

For the foregoing reasons the Appellant, City of Canton, respectfully urges that the Appellee's Motion to Dismiss be denied, and that jurisdiction be accepted over this appeal.

Respectfully submitted,

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